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Supreme Court of the United States

OCTOBER TERM, 1938

MRS. ZILLAH LYON ..... *Petitioner,*

v. No. 189

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION ..... *Respondent.*

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

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[illegible] P. & L. CO., LITTLE ROCK

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows to this Honorable Court that on the 31st day of October, 1936, petitioner commenced an action in the Circuit Court of Benton County in the State of Arkansas to recover on a policy of insurance in which she is named beneficiary issued by the above-named Mutual Benefit Health and Accident Association, hereafter called respondent, by the terms of which it insured petitioner's husband, Wm. R. Lyon, against loss of life from accidental causes. The respondent by appropriate action removed the cause of action into the District Court of the United States for the Western District of Arkansas and thereafter petitioner filed an amended com-

plaint to which respondent filed a general demurrer. The general demurrer was overruled. Verdict was directed in favor of plaintiff and judgment duly entered thereon, from which respondent appealed. The Circuit Court of Appeals reversed the judgment of the District Court.

Statement of the Matters Involved

The policy sued upon was issued on the 31st day of December, 1926, and recites the following consideration, which is found in clause "C" on page 3 of the policy, to-wit:

> "The copy of the application endorsed hereon is hereby made a part of this contract and this policy is issued in consideration of the statements made by the insured in the application and the payment in advance of $74 the first year."

In this clause is also set forth the terms upon which the policy may thereafter be kept in continuous effect, as follows:

> "* * * and the payment in advance of premiums of $64 annually or $16 quarterly thereafter, beginning with April 1, 1927, is required to keep the policy in continuous effect."

This clause also contains provisions governing premium payments as follows:

> "If any such dues are unpaid at the office of the Association in Omaha, Nebraska, this policy shall terminate on the date such premium is due.
>
> "The acceptance of any premium on this policy shall be optional with the Association and should the premium provided for herein be insufficient to meet the requirements of this policy, the Association may call for the difference as required."

Clause "D" contains the following provision, which apparently conflicts with other provisions:

> "The term of this policy begins at twelve o'clock noon standard time on date of issue against accident and on the thirty-first day after date of issue against disease and ends at twelve o'clock noon on date any renewal is due."

The death benefit payable without increase is $2,000, but Part "C" on the first page of the policy and the rider on the third page provide for attractive increases in benefits as follows:

> Part "C": "After the first year's premium has been paid, each year's renewal of this policy shall add $200 to the death benefit until same amounts to $4,000. When twenty full annual premiums have been paid the death benefit of $4,000 as herein provided may be continued in force thereafter at a yearly cost of $4 without medical examination."

The rider on page 3 provides:

> "In event of the accidental death of the insured under the provisions of this policy providing the policy has been in force for one year the Company agrees to pay in addition to the amount otherwise payable an amount equal to all the premiums paid by the insured on the policy plus compound interest at the rate of 4% per annum from the date of the payment of each of said premiums to the death of the insured" (R. 25).

The policy provides for the payment of the premiums at the home office of the Association in the city of Omaha, Nebraska, but prior to the time this policy was issued the Association had appointed one J. T. Cottingham as its local treasurer stationed at the city of Rogers in the State of

Arkansas with authority to solicit insurance, collect premiums and deliver policies (R. 26).

The receipt issued for the first quarterly payment was countersigned by the local treasurer for the Association and contains the following material recital:

> "The Mutual Benefit Health and Accident Association in consideration of the payment of the premium due and subject to provisions of the policy held by insured and the statements and answers in the application signed by the insured, which the insured by the acceptance of this receipt repeats and declares to be true and agrees shall be the basis of his contract of insurance, does hereby continue in force the said policy from date hereof until twelve o'clock noon standard time July 1, 1927, at which time the next quarterly premium will be due. Yours truly, C. G. Criss. Countersigned this 25th day of March, 1927.
>
> "By: J. T. Cottingham, Local Treasurer". (R. 27).

Each subsequent receipt contains identical recitals excepting date and each was signed by Roy E. Hamilton, Local Treasurer, except the last one, which is signed by Harold R. Parker, Local Treasurer. The material recitals read as follows:

> "The payment of this premium receipted for if made on or before date due keeps your policy in continuous effect and if paid after date due reinstates the policy on date of this receipt as provided in policy until twelve o'clock noon standard time October 1, 1927, at which time another payment will be due" (R. 29-37 to 43).

At the trial the testimony showed that all premiums due on the policy had been paid and receipted for excepting the premium due on the 1st day of July, 1934 (R. 28).

The Association prior to July 1, 1927, appointed one Roy E. Hamilton to succeed Mr. Cottingham as its local treasurer at the said city of Rogers, who collected each and every premium due from the insured prior to the 1st day of April, 1934. The Association without notice to the insured changed its method of collecting premiums and required that same be paid to its local treasurer in the city of Little Rock, Arkansas. The petitioner, who acted as agent for the insured in the payment of all premiums, had been accustomed to make payment at the office of the local treasurer for a period of more than seven years and the local treasurer gave express consent to the payment of premiums out of time and on numerous occasions received payments of premiums after date same were due and payable (R. 28 and receipts R. 29-37 to 43).

When the premium came due on the 1st day of April, 1934, petitioner appeared at the local treasurer's office to make the payment. He was absent. A girl child was present in the office who informed petitioner that the local treasurer was absent and suggested that the premium would have to be sent to Little Rock, Arkansas, and gave petitioner the name of the person to whom it could be sent but gave petitioner no information or intimation that Mr. Hamilton was no longer the local treasurer authorized to collect premiums. Petitioner sent the quarterly premium to Little Rock and received a receipt for same but no notice that future premiums should be sent to Little Rock was given her (R. 29).

When the premium came due on the 1st day of July, 1934, petitioner appeared at the office of the local treasurer

to pay the premium but the office was closed and the local treasurer absent. Petitioner immediately set about to locate the local treasurer, but was unable to do so until the fifth day of the month at which time she found the local treasurer at his office and tendered him the premium. The local treasurer refused to receive the premium, saying: "Didn't you receive notice?" Petitioner replied that she had not received any notice. Then the local treasurer advised petitioner that the premium would have to be sent to Little Rock. Petitioner sent the premium to Little Rock by postal money order but same was refused on the ground that payment was tendered out of time (R. 30).

The petitioner was the only witness in the trial. She identified the policy sued upon and same was introduced and received in evidence. She testified that all requirements of the policy had been met, and this is undisputed, except the matter of payment of premium for the first year in advance (R. 24).

Petitioner testified on direct examination that when the application for the insurance was made she was present; that the application was sent in to the company and the policy was later delivered to the insured; that the premium for the first year in the sum of $74 was paid in advance at the time the policy was delivered; that she paid a part of the first year's premium and that her husband paid the balance (R. 24-27).

On cross-examination by counsel for respondent, petitioner testified as follows:

"That the policy was purchased in Rogers, Arkansas; Mr. J. T. Cottingham took the application; he is now dead;

that she paid a premium of $74 for the first year but did not get a receipt for the same; that Mr. Cottingham said the policy was a receipt. She made her next premium payment on the 1st of April, 1927. The policy was obtained on the 31st day of December, 1926.

"Q. Why was it, if you know, that you paid a quarterly premium on the 1st day of April, 1927, or just three months after you said that you had paid a premium for the entire year?

"A. Well, in order to keep my premiums up—because Mr. Cottingham said there was no days of grace included in the policy, but if we paid a year's premium in advance that would take the place of these days of grace" (R. 43).

After all the testimony was in, counsel for the defendant presented to the Court an oral motion to strike that part of petitioner's testimony relating to the payment of the first year's premium, as follows:

"Mr. Pryor: If the Court please, at this time we desire to move to strike the testimony of Mrs. Lyon regarding her testimony to the effect that she paid $74 at the time this policy was applied for on the ground that it is not pleaded in the complaint and is not an issue that is raised by the pleadings in this Court" (R. 44-45).

The Court overruled the motion to strike and commented as follows:

"The Court: The motion will be overruled. The Court is of the opinion that the testimony is admissible. Her reason for the payment of this was brought out by the defendant's counsel. In the next place the Court is of the

opinion that this question is raised and that he overruled the demurrer on the ground that she had paid—the allegation that she had paid the policy up past the date of July 1, 1934. This question was raised on demurrer. The Court at that time thought it was sufficiently alleged, and I still think it is sufficiently alleged, to cover that point. So your motion will be overruled and you may have your exception" (R. 45).

The material allegations of the complaint bearing on the question of payment of the premiums are as follows:

"That on December 31, 1926, the defendant issued and delivered to Wm. R. Lyon, plaintiff's deceased husband, a policy of life insurance, by the terms of which said defendant for and in consideration of the sum of $74 premium for the first year *paid in advance* and the sum of $64 annually thereafter payable in *quarterly* instalments of $16 each in advance, *beginning on the 1st day of April, 1927.*

"That on the 19th day of July, 1934, while said policy was in full force and effect, the said Wm. R. Lyon lost his life by accidental causes; that notwithstanding all dues and premiums *had been paid* on said policy and the insured and plaintiff had fully performed the conditions and requirements of said policy and made due demand for payment, defendant has failed and now refuses to pay the sum due thereon.

"That the insured paid all premiums due thereon in the sum of $464 and an additional sum of $48; that the defendant was without right to claim or declare a forfeiture

of said policy for nonpayment of said premium on said 1st day of July for the following reasons, to-wit:

"Third. That said premium had been previously paid and therefore was not due and payable on said 1st day of July and the insured was not liable for payment of same at said time" (R. 12-13).

Counsel for respondent declining to offer any evidence, moved the Court to direct a verdict in favor of respondent as follows:

"That the policy terminated by its own terms on the 1st day of July, 1934, and that the defendant herein, as shown by the policy and as the evidence discloses, had the option to reject the premium payment and exercised that option; and on the further ground that the premium receipts, themselves, show that the policy terminated on the 1st day of July, 1934, prior to the time this loss occurred" (R. 47).

The motion was overruled. The Court upon its own motion directed the jury to return a verdict in favor of the plaintiff in the sum of $3,678 and judgment was duly entered, to which action the defendant excepted and by appropriate steps appealed to the United States Circuit Court of Appeals for the 8th Circuit (R. 47).

The assignments of error material in the consideration of the case here are that the Court erred in overruling the defendant's demurrer to the complaint; in overruling the defendant's motion to strike testimony of the plaintiff with reference to the payment of the first year's premium in advance; in overruling the defendant's motion for an

instructed verdict; in directing a verdict for the plaintiff (R. 49 to 53).

The Circuit Court of Appeals in the majority opinion held that by reason of the policy provision that "no agent has authority to change the policy or waive its provisions" and that "no change shall be valid unless approved by an executive officer of the company and endorsed on the policy," the local treasurer was not authorized to make the oral agreement concerning premium payments and that the testimony of Mrs. Lyon relating to payment of the $74 in advance is incompetent; that the respondent acted within its rights in refusing the premium tendered on July 6, 1934, and in terminating the contract, and that petitioner can not recover on the policy (R. 58 to 69).

Questions Presented

1st. Where the insured stated in the application that premiums would be paid quarterly, but upon advice of the local treasurer, having authority to solicit insurance, collect the initial and renewal premiums, and deliver the policy, insured paid the $74 for the first year in advance and elected to pay quarterly premiums thereafter beginning on April 1, 1927, so as to keep premiums paid a year in advance to take the place of days of grace, was this action of the local treasurer in excess of his apparent authority which insured was lawfully justified in relying upon?

2nd. Where plaintiff testified, without objection, that $74 for the first year were paid in advance, and counsel for defendant, on cross-examination of plaintiff, elicited testimony proving the same fact and also proving the conversa-

tions and oral agreements, between the insured and the local treasurer, relating to payment of the premiums, did the admission and consideration of such testimony by the trial court constitute reversible error?

3rd. Is a provision in the policy limiting authority of respondent's agents binding on insured before delivery of the policy and in the absence of any proof tending to charge the insured with notice of such limitation?

4th. Where counsel for defendant, without first having objected to the testimony when offered and after the evidence was all in moved to strike the testimony of Mrs. Lyon, relating to payment in advance of the $74 for the first year, upon the specific ground, that such payment is not pleaded in the complaint and is not an issue raised by the pleadings, and the trial court held that such payment was sufficiently pleaded and the testimony responsive to that issue, and the testimony was not challenged upon any other or different ground, can the admissibility of that testimony be held error on appeal upon the new and different ground that it tends to change and extend the terms of the written contract?

5th. Where the policy provides that it is issued in consideration of statements in the application and payment in advance of $74 for the first year, and that payment of $64 annually or $16 quarterly thereafter in advance is necessary to keep the policy in continuous effect; provides for payment of death benefits in the sum of $2,000 during the first year; provides that after the policy has been in force one year the benefits shall increase at the rate of $200 annually until benefits amount to $4,000; provides that if death

from accidental causes occurs after the policy has been in force one year the company will pay, in addition to other benefits payable, a sum equal to all premiums paid with 4% interest compounded from date of payment; provides that if twenty full years' premiums have been paid on the policy the amount of insurance then in force may be carried at a premium of only $4 annually without medical examination; provides that if premiums are not paid at the home office at the time provided the policy will become void on the day renewal premium is due; for each premium paid a receipt was issued reciting that payment of the premium due continues the policy in force till the 1st day of the succeeding quarter when another premium payment will be due; the policy was continued in force until extra benefits in the sum of $1,678 had been earned by insured's faithful performance of the contract, were these provisions, recitals, and circumstances, and respondent's course of action relative to performance, sufficient to impress the contract with the character of lifetime insurance and justify a construction that it was the intent of the parties that punctual payment of the premiums would entitle the insured to continue the policy in force and enjoy the extra benefits earned notwithstanding other conflicting provisions.

Reasons Relied on for Issuance of Writ

I.

The application for the insurance was made and the policy delivered in the State of Arkansas, therefore the policy is an Arkansas contract and the rights of the parties thereunder should be adjudicated in conformity to the laws of that State. The judgment of the trial court reflects the

law of the case as declared by the Supreme Court of Arkansas. Each holding of the Circuit Court of Appeals is in conflict with the decisions of that Court. The laws of the State in which the contract is made and to be performed are the rules of decision in Federal Courts in cases of this nature.

Erie v. *Thompkins*, 82 L. ed. 787, decided by this Court 4-25-38.

John G. Rhulin v. *New York Life Ins. Co.*, 82 L. ed. 823, decided by this Court 5-2-38.

Mutual Benefit Health & Accident Ass'n v. *Lena Bowman*, decided by this Court 5-31-38.

II.

The holding that the testimony of Mrs. Lyon is incompetent and that the local treasurer's action in receiving the first year's premium in advance was unauthorized is in conflict with the following decisions of the Supreme Court of Arkansas, holding that an agent of an insurance company having authority to solicit insurance, deliver policies, and collect premiums, is a general agent for all purposes within the apparent scope of the agency.

Queen of Arkansas Ins. Co. v. *Malone*, 111 Ark. 229.

Concordia Fire Ins. Co. v. *Mitchell*, 122 Ark. 357.

Caldwell v. *Fitzhugh*, 175 Ark. 806.

These holdings are also in conflict with the decisions of this Court.

California Ins. Co. v. *Union Compress Co.* 133 U. S. 418.

Home Ins. Co. v. *Baltimore Warehouse Co.*, 93 U. S. 542.

McMaster v. *New York Life Ins. Co.*, 183 U. S. 25.

III.

The holdings that the term of the policy is limited to the period intervening between the date a premium is paid and the date the next quarterly premium becomes due and payable, and that respondent had lawful right to terminate the contract, are in conflict with the following decisions of the Supreme Court of Arkansas holding that where the provisions of the contract are conflicting and for that reason susceptible to different meanings the one most favorable to the insured must be adopted as reflecting the intent of the parties.

United Order of Good Samaritans v. *Grigsby*, 180 Ark. 610.

Life & Casualty Ins. Co. of Tennessee v. *Ford*, 172 Ark. 1098.

Pfeiffer v. *Missouri State Life*, 174 Ark. 783.

These holdings are also in conflict with decisions of this Court.

National Bank v. *Ins. Co.*, 95 U. S. 673.

IV.

The Circuit Court of Appeals held in effect that by consideration of the evidence of the plaintiff relating to payment of the premium for the first year in advance the trial court committed reversible error. This ruling is in

conflict with the well-established rule of procedure that requires a specific objection to the testimony challenged; a ruling on the objection and an assignment of error setting out the testimony objected to and the reasons for the objections, and is in conflict with former decisions of the Circuit Court of Appeals for the 8th Circuit.

Board of Com'rs of Kearney, Kan., v. *Irvin* 126 Fed. 689.

Kruse v. *Snyder*, 87 Fed. (2d) 723.

Lehman v. *Burnes National Bank*, 20 Fed. (2d) 897.

This holding is also in conflict with decisions of other Circuit Courts of Appeals.

5th Circuit

Gallot v. *U. S.*, 87 Fed. 446.

6th Circuit

Garrett v. *Pope Motor Co.*, 168 Fed. 905.

7th Circuit

Atlas Distilling Co. v. *Rhenstrom*, 86 Fed. 224.

9th Circuit

Lewis v. *Standard Oil Co.*, 88 Fed. (2) 897.

Wherefore your petitioner prays that a writ of certiorari may issue and that the judgment of the United States Circuit Court of Appeals for the 8th Circuit may be reversed and all appropriate relief awarded to petitioner.

Respectfully submitted,

JOHN W. NANCE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The majority opinion of the Appeals Court and concurring opinion appear at R. 57 to 69, inclusive. To preserve brevity same are not copied here.

Jurisdictional Statement

The jurisdiction of this court is invoked under the provisions of Sec. 240 (a) of the Judicial Code as amended by the Act of Feb. 13, 1925, Sec. 347 (a), Title 28 U. S. Code.

The plaintiff is a citizen of the State of Arkansas and the defendant is an insurance corporation domiciled in the State of Nebraska. The amount involved is $3,678, exclusive of interest.

The judgment of the Court of Appeals reversing the judgment of the District Court was entered March 19, 1938. Motion for rehearing was filed April 1, 1938. Judgment overruling motion for rehearing was entered April 11, 1938 (R. 69 to 71).

Specifications of Error

The Circuit Court of Appeals erred:

1st. In holding that the testimony of Mrs. Lyon relating to the payment of $74 for the first year in advance is incompetent and therefore inadmissible.

2nd. In holding that the action of the local treasurer in collecting the $74 for the first year in advance and consenting to premium payments out of time was in excess of his authority and therefore not binding on respondent.

3rd. In holding that the policy contract is one of term insurance which respondent could lawfully discontinue at any premium paying date and therefore petitioner cannot recover on the contract.

4th. In holding that the District Court erred in directing a verdict for plaintiff and in reversing the judgment of the District Court.

ARGUMENT

Specification No. 1

The Circuit Court of Appeals clearly erred in holding the testimony of Mrs. Lyon relating to payment of the first year's premium in advance to be incompetent and inadmissible. That part of her testimony brought out on direct examination was not objected to, therefore the motion to strike was properly overruled. This contention is well supported by the weight of authority.

Failure to object to the testimony and assign the ruling of the Court as error is fatal to respondent's right to challenge the competency and admissibility of the testimony on appeal. Such has long been the rule in the Circuit Court of Appeals for the 8th Circuit and is the rule in all Federal Courts.

Board of Com'rs of Kearney, Kan., v. *Irvin*, 126 Fed. 689.

Kruse v. *Snyder*, 87 Fed. (2d) 723.

Lehman v. *Burnes National Bank*, 20 Fed. (2d) 897.

Lewis v. *Standard Oil Co.*, 88 Fed. (2d) 512, 9th Ct.

Garrett v. *Pope Motor Co.*, 168 Fed. 905, 6th Ct.

Atlas Distilling Co. v. *Rhenstrom*, 86 Fed. 224, 7th Ct.

Gallot v. *U. S.*, 87 Fed. 446, 5th Ct.

Counsel for respondent moved to strike the testimony on the specific ground that it was not responsive to the

pleadings. On appeal the Court held it was incompetent because it tended to change and extend the written contract. That question was not raised by respondent in the trial court, neither was it raised or urged by respondent in the appeals court. The trial court was not asked to rule on that question, therefore respondent waived and lost its right to challenge the competency of the testimony on that ground.

In the case of *Lehman* v. *Burnes National Bank, supra,* a similar question was presented and it was there held that a party cannot object on one ground in the trial court and rely on an entirely different ground in the Court of Appeals. But this case presents a much more anomalous situation. Here we find the appeals court reversing the trial court for the admission and consideration of testimony brought out by counsel for the appellant.

Specification No. 2 –

The Court of Appeals erred in its conception of the transaction between the insured and respondent's local treasurer. That transaction does not involve any material change or extension of the terms of the contract. It is not uncommon for a policyholder to deposit funds with the insurance company to meet premium payments subsequently coming due. The arrangement was to keep premiums paid in advance to take the place of days of grace.

The policy in plain terms requires the payment of $74 in advance and in equally plain terms provides that the subsequent annual premiums may be paid in one sum of $64 in advance or quarterly instalments of $16 in advance.

No liberal interpretation of the policy provisions would require the $74 for the first year to be paid in quarterly instalments. It must be paid in advance, but not quarterly, and the policy was unmistakably written so as to conform to the arrangement between the insured and the local treasurer. If ambiguous the provision must be resolved against the respondent.

Life & Casualty Ins. Co. of Tennessee v. *Ford*, 172 Ark. 1098.

Parol evidence is admissible to aid in the interpretation or construction of the policy where there is ambiguity in its provisions.

33 C. J., p. 115, Sec. 840.

California Ins. Co. v. *Union Compress Co.*, 133 U. S. 418.

Home Ins. Co. v. *Baltimore Warehouse Co.*, 93 U. S. 542.

The local treasurer, having authority to solicit the insurance, collect initial and renewal premiums, and deliver the policy, was a general agent for all purposes within the scope of his agency and had apparent authority to make special arrangements with insured relating to payment of premiums.

Queen of Ark. Ins. Co. v. *Malone*, 111 Ark. 229.

Concordia Fire Ins. Co. v. *Mitchell*, 122 Ark. 357.

Caldwell v. *Fitzhugh*, 175 Ark. 806.

The local treasurer was not an ordinary soliciting agent His designation as local treasurer gave him an apparent

official character and justified insured in dealing with him as an official of the respondent company in charge of its business affairs generally at Rogers, Arkansas, with authority to waive strict compliance with requirements relative to premium payments.

In the case of *Caldwell* v. *Fitzhugh*, above cited, the soliciting agent of a life insurance company, without authority from his principal, promised orally to make the insured a loan. The insurance company was also in the business of making loans. The Supreme Court of Arkansas held that the soliciting agent was a general agent in soliciting the insurance and collecting the premium and therefore could bind his principal with the promise to make the loan, notwithstanding he acted contrary to instructions, but without the insured's knowledge.

The insured in this case had no actual or constructive notice of any limitation on authority of the local treasurer. No limitation was expressed in the application. The limitation expressed in the policy came too late to bind insured in the preliminary negotiations.

32 C. J. 1065, Sec. 141.

Hartford Fire Ins. Co. v. *Wilson*, 187 U. S. 467.

Mutual Benefit Life Ins. Co. v. *Robinson*, 58 Fed. 723.

Peoples Fire Ins. Ass'n v. *Goyne*, 79 Ark. 315.

16 L. R. A. (N. S.) 1180.

Provisions for payment of renewal premiums are separable and not applicable to payment of first premium.

McMaster v. *New York Life Ins. Co.*, 183 U. S. 25.

Specification No. 3

Where two provisions of the policy are conflicting the one most favorable to the insured will be adopted as reflecting the intent of the parties.

United Order of Good Samaritans v. *Grigsby*, 180 Ark. 610.

National Bank v. *Ins. Co.*, 95 U. S. 673.

Where the policy contains conflicting provisions which make the contract as a whole susceptible to different meanings, the Court will ascertain the true intent of the parties.

13 C. J., pp. 520-56, Secs. 481-497.

Where it contains provisions that impress it with the essential character of lifetime insurance as does the one here involved; offers attractive rewards for continuous performance; enables insured, by continuous performance, to build up a one hundred per cent increase of benefits which he may carry for only $4 annually without medical examination after payment of premiums for twenty years; provides for additional payment of a sum equal to all premiums paid with compound interest, an entraordinary saving and investment feature, all of which is lost if the policy is terminated; a receipt is issued for each premium payment, reciting not that the policy will terminate at the next premium paying date, but that on that date another premium payment will be due, reason and justice would seem to compel a construction allowing such previsions to prevail over a conflicting provision that would under strict

construction authorize an arbitrary termination of the contract and thus deprive insured of his earned benefits.

Under the construction given this policy by the Appeals Court it was permissible for respondent to receive premium payments for the full twenty-year period, then discontinue the contract to avoid carrying the liability at the reduced premium rate. Such a construction is condemned by its own injustice. The conclusion that this policy was intended by the parties to be lifetime insurance is inescapable and when construed so as to effectuate that intent it provides for termination by respondent only for breach by the insured.

The respondent is a mutual association. Dividends are not distributed direct to the policyholders, but it is contemplated that they will participate in the earnings on basis of annual increase of benefits and return of premiums with interest added.

It may be fairly assumed that premium rates are fixed to provide for payment of the increase of benefits. By payment of the initial premium insured's rights are limited to protection in the sum of $2,000 for the first year but by payment of renewal premiums he acquired a vested right to participate in the earnings of the Association on basis of increased benefits. To hold otherwise is to nullify the contractual obligation of respondent to give effect to the provisions for rights and benefits to be earned by continuous payment of the premiums.

Respondent terminated the premium collecting agency without notice to insured. That was the sole reason for

delay in payment of the premium due July 1, 1934. Termination of the agency was not binding on the insured without notice.

32 C. J. 1062, Sec. 37.

State Life Ins. Co. v. *Murray*, 159 Fed. 408.

Burlington Ins. Co. v. *Threlkeld*, 60 Ark. 539.

Specification No. 4

The testimony of petitioner relating to payment of the premium for the first year in advance is undisputed. The respondent did not offer any evidence in the trial, but relied solely on questions of law. If the trial court correctly decided the questions of law and the undisputed evidence of petitioner is legally competent, or if incompetent and respondent, by failure to object and by proving the same facts by testimony elicited from the witness by its own counsel, waived its right to challenge the testimony on appeal, the action of the trial court in directing a verdict was not error and the judgment should have been affirmed.

Arthur v. *Morgan*, 112 U. S. 495.

Anderson County v. *Beal*, 113 U. S. 227.

Pollock v. *Bush*, 128 U. S. 446.

If there are facts or circumstances that impair the conclusiveness of the testimony of petitioner, the question of whether the $74 premium was paid in advance would necessarily become a jury question.

State Life Ins. Co. v. *Murray*, 159 Fed. 408.

Leather M'f'g National Bank v. *Morgan*, 117 U. S. 96.

It is respectfully urged that the judgment of the District Court is correct and that the writ of certiorari should be allowed and the case remanded to the Circuit Court of Appeals with directions to affirm it.

Ritzer v. *Ward*, 109 U. S. 18.

Ft. Scott v. *Hickman*, 112 U. S. 165.

Respectfully submitted,

JOHN W. NANCE,
Counsel for Petitioner.